

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Cox Communications Hampton Roads, LLC	)	
	)	CSR 8061-E
Petition for Determination of Effective	)	
Competition in Virginia and North Carolina	)	
Franchise Areas	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 16, 2011**

**Released: March 21, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Cox Communications Hampton Roads, LLC (“Cox” or the “Company”), has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), and 76.907 of the Commission’s rules for a determination that the Company is subject to effective competition in those communities listed on Attachment A (the “Attachment A Communities”). Cox alleges that its cable system serving the Attachment A Communities is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (the “Act”) and the Commission’s implementing rules,<sup>1</sup> and is therefore exempt from cable rate regulation there. The basis for Cox’s allegation is the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”) and DISH Network (“DISH”) in all the Attachment A Communities, and two other providers in specific Attachment A Communities. Cox also claims, pursuant to Section 623(1)(1)(A) of the Act and Section 76.905(b)(1) of the Commission’s rules,<sup>2</sup> to be exempt from cable rate regulation in the Communities listed on Attachment B (the “Attachment B Communities”) because Cox serves fewer than 30 percent of the households there. Third, Cox claims, pursuant to Section 623(1)(1)(D) of the Act and Section 76.905(b)(4) of the Commission’s rules, that it is exempt from cable rate regulation in the Communities listed on Attachment C (the “Attachment C Communities”) because of the competing service provided by a local exchange carrier, Verizon Virginia, Inc. (“Verizon”).<sup>3</sup>

2. The petition was opposed as to four specific Communities by the franchise authorities there – the Cities of Chesapeake, Hampton, Norfolk, and Virginia Beach. Cox filed a consolidated reply. Later, the Cities of Chesapeake, Hampton, and Virginia Beach withdrew their oppositions,<sup>4</sup> leaving the City of Norfolk (the “City”) the only opponent of Cox’s petition. After the close of the standard pleading cycle, the Commission raised an issue about competing service providers in Norfolk,<sup>5</sup> and both Cox and

<sup>1</sup> See 47 U.S.C. § 543(1)(1)(B); 47 C.F.R. § 76.905(b)(2).

<sup>2</sup> See 47 U.S.C. § 543(1)(1)(A); 47 C.F.R. § 76.905(b)(1).

<sup>3</sup> See 47 U.S.C. § 543(1)(1)(D); 47 C.F.R. § 76.905(b)(4).

<sup>4</sup> Withdrawal of Oppositions to Petition for Special Relief by the Cities of Chesapeake, Hampton, and Virginia Beach, Virginia.

<sup>5</sup> E-mail from John W. Beresford, Esq., Commission counsel, to Gary S. Lutzger, Esq., Dow Lohnes PLLC, counsel for Cox, and Brian T. Grogan, Esq., Moss & Barnett, counsel for the City, dated 9:46 A.M., Feb. 23, 2011.

the City expressed their views.<sup>6</sup> For the reasons set forth below, we grant the petition based on our finding that Cox is subject to effective competition in the Communities listed on Attachments A, B, and C.

## II. THE COMPETING PROVIDER TEST

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>7</sup> as that term is defined by Section 623(l) of the Act and Section 76.905 of the Commission's rules.<sup>8</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>9</sup>

4. Section 623(l)(1)(B) of the Act creates the so-called "competing provider" test for effective competition. It provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPDs") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>10</sup>

### A. Cox's Evidence

5. The first part of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.<sup>11</sup> The City accepts that Cox has satisfied the first part of the competing provider test.<sup>12</sup> Thus, it is undisputed that the Attachment A Communities are "served by" both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Cox or with each other. A franchise area is considered "served by" an MVPD if that MVPD's service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.<sup>13</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>14</sup> The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>15</sup> and is supported in this petition with copies of channel

<sup>6</sup> Letter from Mr. Lutzger to Mr. Berresford, dated Feb. 25, 2011 ("Lutzger Letter"); Letter from Mr. Grogan to Mr. Berresford, dated March 10, 2011 ("Grogan Letter"); Letter from Mr. Lutzger to Mr. Berresford, dated March 15, 2011.

<sup>7</sup> 47 C.F.R. § 76.906.

<sup>8</sup> See 47 U.S.C. § 543(l); 47 C.F.R. § 76.905.

<sup>9</sup> See 47 C.F.R. §§ 76.906-907(b).

<sup>10</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>11</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>12</sup> Opposition to Petition for Special Relief by the City of Norfolk, Virginia ("Opposition") at 3.

<sup>13</sup> See Petition at 6.

<sup>14</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>15</sup> See 47 C.F.R. § 76.905(g); see also Petition at 5.

lineups for both DIRECTV and DISH.<sup>16</sup> Also undisputed is Cox's assertion that both DIRECTV and DISH offer service to at least "50 percent" of the households in the Attachment A Communities because of their national satellite footprint.<sup>17</sup> Accordingly, we find that the first part of the competing provider test is satisfied.

6. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Cox asserts that it is the largest MVPD in all the Attachment A Communities but one.<sup>18</sup> The exception is New Kent County (VA0496), in which both Cox and the DBS providers have household shares over 15 percent. In such conditions, it is clear that the number of households subscribing to MVPDs other than the largest one exceeds 15 percent of the households.<sup>19</sup>

7. The competing provider test thus required Cox to make a ratio for each Attachment A Community, the numerator of which was the number of DBS subscribers there and, in a few specific Attachment A Communities, the number of subscribers to two other MVPDs, Cavalier Telephone and/or Campus Televideo.<sup>20</sup> The denominator of the competing provider ratio in each Attachment A Community was the number of households there. To calculate the numerator of each ratio, Cox began by estimating the number of DBS subscribers in each Attachment A Community, using a method that we have accepted many times and that the City of Norfolk does not dispute.<sup>21</sup>

8. Cox obtained Cavalier Telephone's subscriber number (1,396) from a report that Cavalier made to the City.<sup>22</sup> At the time that is material to this proceeding, Cavalier provided MVPD service on its own network of wireline facilities.<sup>23</sup> Later, Cavalier stopped doing so and began reselling DIRECTV's DBS service.<sup>24</sup> At the material time, however, the two companies operated separate networks and to count their subscribers separately is not double counting. The City requests that in light of Cavalier's later retirement of its wire-based cable service, we disregard the 1,396 subscribers to that service.<sup>25</sup> We deny this request. The material time is the filing date of the petition. In addition, an update to reflect later conditions, if it were to be fully balanced, would include not only Cavalier's shift to DBS, but any growth in DBS subscribership (due to organic growth in addition to Cavalier's shift). The City has not produced

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<sup>16</sup> See Petition at Exh. 4.

<sup>17</sup> See Petition at 5-6.

<sup>18</sup> See *id.* at 9.

<sup>19</sup> If Cox is the largest MVPD, then MVPDs other than the largest one are the DBS providers, which have a combined share of over 15%. On the other hand, if one of the DBS providers is the largest MVPD, then Cox (which alone has over 15%) and the other DBS provider combined have over 15%. See, e.g., *Comcast Cable Commun., LLC*, 23 FCC Rcd 10939, 10941, ¶ 9 (2008).

<sup>20</sup> The Petition reports subscribers to Cavalier Telephone MVPD service in the Cities of Hampton, Norfolk, and Williamsburg, and subscribers to Campus Televideo in the City of Norfolk. Petition at 4 n.12, 11-12; *id.* at Exh. 10. Cavalier Telephone is a competitive "triple play" provider; Campus Televideo is a Satellite Master Antenna Television provider that serves the campus of Old Dominion University in Norfolk. Petition at 4 & n.12; *id.* at Exh. 10; Cox's Consolidated Reply to Oppositions Submitted by the Cities of Chesapeake, Hampton, Norfolk, and Virginia Beach, Virginia ("Reply") at 4, 17.

<sup>21</sup> Petition at 9-12.

<sup>22</sup> Petition, Exh. 10. The same report to the City of Norfolk stated Cavalier's subscriber numbers in the Cities of Hampton and Williamsburg.

<sup>23</sup> Lutzger Letter at 1.

<sup>24</sup> Grogan Letter at 1-2.

<sup>25</sup> *Id.* at 2.

any such balanced update. The record is complete as of the pertinent time, which is the filing date of the petition. Accordingly, we will count Cavalier's 1,396 subscribers on or about that time in the numerator of the ratio for Norfolk.<sup>26</sup>

9. Cox obtained Campus Televideo's subscriber number (1,553) over the telephone.<sup>27</sup> Cox then summed the subscriber numbers of all the MVPDs other than the largest one in each Attachment A Community, thus producing a numerator for each competing provider ratio. To calculate the denominator of the ratios – the number of households in each Community – Cox obtained household numbers from the 2000 Census for Communities that were not military installations. For military installations, Cox obtained household numbers from the companies that managed the non-barracks housing on the installations.<sup>28</sup>

10. The subscribership levels for the MVPD providers other than the largest are displayed in Attachment A and show subscribership exceeding 15 percent of the households in each Attachment A Community. These numbers, if accepted, show that the second part of the competing provider test is satisfied for each of the Attachment A Communities.

## **B. The City of Norfolk's Contentions**

### **1. Threshold Matters**

11. The City of Norfolk's Opposition contains neither the documentation or affidavit<sup>29</sup> nor the verification<sup>30</sup> that our rules require. Norfolk is a substantial municipality with outside counsel. It is fair to expect it to comply with the Commission's rules. Accordingly, we strike the City of Norfolk's Opposition and will consider it only as informal comments to Cox's Petition.<sup>31</sup>

### **2. Substance**

12. The City makes two specific objections to Cox's evidence for the second part of the competing provider test. First, the City objects to counting Cavalier's 1,396 subscribers because that company has no franchise from the City and, in the City's opinion, no authority to provide service in Norfolk.<sup>32</sup> Assuming *arguendo* that the City is correct and that Cavalier provided service without local authority, it is most significant that the City tolerated Cavalier's conduct and, as far as the present record indicates, took no effective steps to stop it. We reject the City's request that we disregard the state of competition that it tacitly allowed to occur at the pertinent time.

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<sup>26</sup> If the City believes that effective competition is no longer present within its franchise area, it may file a petition for recertification pursuant to Section 76.916 of the Commission's rules. 47 C.F.R. § 76.916.

<sup>27</sup> Reply at 18.

<sup>28</sup> Petition at 10-11 & Declaration of H. Steven Goad, Cox Manager of Government Relations, ¶¶ 4-5.

<sup>29</sup> 47 C.F.R. § 76.6(a)(3) provides that "[f]acts must be supported by relevant documentation or affidavit." The Opposition contains no affidavit and only one document, which provides only limited support for the allegations made in the Opposition about Cavalier Telephone's history with the City.

<sup>30</sup> 47 C.F.R. § 76.6(a)(4), in brief, requires that pleadings such as the Opposition contain a written verification that its signatory has a reasonable and good faith belief in the facts alleged and legal assertions made therein. "If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose appropriate sanctions."

<sup>31</sup> See *Comcast Cable Commun., LLC*, 23 FCC Rcd 8546, 8548, ¶ 8 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 690, ¶ 1 (2007).

<sup>32</sup> Opposition at 1-4.

13. Second, the City objects to counting any subscribers to Campus Televideo because Cox failed to present any documentary evidence of its subscriber number.<sup>33</sup> This objection has some merit because Cox's petition not only fails to substantiate Campus Televideo's subscriber number, it even fails to state what that number is.<sup>34</sup> Cox's Reply, however, states that while it was preparing the petition Campus Televideo advised Cox on the telephone that it had 1,553 subscribers in Norfolk.<sup>35</sup> The Reply also includes a written statement to exactly that effect by Campus Televideo's Chief Executive Officer.<sup>36</sup> Accordingly, Cox has cured any defect in its petition and we find that, for purposes of measuring effective competition in Norfolk, the MVPD Campus Televideo has 1,553 subscribers.

### C. Conclusions

14. We find that in Norfolk, which has 86,210 census households, there are 11,084 DBS subscribers, 1,396 Cavalier Telephone subscribers, and 1,553 Campus Televideo subscribers, for a total of 14,033 subscribers to programming services offered by MVPDs other than the largest MVPD. That yields a ratio of 16.28 percent, which satisfies the second part of the competing provider test.

15. Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Cox is subject to effective competition in the Attachment A Communities.

## III. THE LOW PENETRATION TEST

16. Section 623(l)(1)(A) of the Act provides that a cable operator is subject to effective competition if the Cox serves fewer than 30 percent of the households in the franchise area. This test is referred to as the "low penetration" test.<sup>37</sup> Cox alleges that it is subject to effective competition under the low penetration effective competition test because it serves less than 30 percent of the households in the Attachment B Communities.

17. Based upon the subscriber penetration level calculated by Cox, as reflected in Attachment B, we find that Cox has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Attachment B Communities. Therefore, the low penetration test is satisfied as to the Attachment B Communities.

## IV. THE LEC TEST

18. Section 623(l)(1)(D) of the Act provides that a cable operator is subject to effective competition if a local exchange carrier ("LEC"), or its affiliate, offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator.<sup>38</sup> This test is referred to as the LEC test.

19. The Commission has stated that the incumbent cable operator must show that the LEC

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<sup>33</sup> Opposition at 1-2, 4.

<sup>34</sup> See Petition at 12.

<sup>35</sup> Reply at 18.

<sup>36</sup> *Id.* at Exh. 3.

<sup>37</sup> 47 U.S.C. § 543(l)(1)(A).

<sup>38</sup> See 47 U.S.C. § 543(l)(D).

intends to build out its cable system within a reasonable period of time if it has not completed its build out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.<sup>39</sup> It is undisputed that the Attachment C Communities are served by both Cox and Verizon, a local exchange carrier, and that these two MVPD providers are unaffiliated. The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>40</sup> and is supported in this petition with copies of channel lineups for Verizon.<sup>41</sup> Finally, Cox has demonstrated that the Verizon has commenced providing video programming service within the Attachment C Communities, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.<sup>42</sup>

20. Based on the foregoing, we conclude that Cox has submitted sufficient evidence demonstrating that its cable system serving the Attachment C Communities has met the LEC test and is subject to effective competition.<sup>43</sup>

## V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Cox Communications Hampton Roads, LLC, **IS GRANTED**.

22. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachments A, B, and C **IS REVOKED**.

23. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>44</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Senior Deputy Chief, Policy Division, Media Bureau

<sup>39</sup> See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-15 (1999) ("Cable Reform Order").

<sup>40</sup> See 47 C.F.R. § 76.905(g). See also Petition at 23.

<sup>41</sup> See Petition at Exh. 15.

<sup>42</sup> See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petition at 19-24.

<sup>43</sup> Cox claims that it is subject to LEC effective competition in the Communities of Chesapeake, Hampton, Langley Air Force Base, and Portsmouth. Petition at 13. We need not adjudicate these claims because Cox has satisfied the competing provider test in those Communities.

<sup>44</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 8061-E

## COMMUNITIES SERVED BY COX COMMUNICATIONS HAMPTON ROADS, LLC

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2000 Census Households</b>	<b>Estimated Competing Provider Subscribers</b>
Chesapeake	VA0284, VA0430	19.96%	69900	13954
Gloucester County	VA0272	40.28%	13127	5288
Hampton	VA0044	17.85%	53887	9621
James City County	VA0270	18.75%	19003	3563
Langley Air Force Base	VA0194	17.37%	1121	195
Naval Bases	VA0291, VA0407**	15.39%	367	56
New Kent County	VA0496	59.64%	4925	2937
Norfolk	VA0139	16.28%	86210	14033
Portsmouth	VA0140	17.71%	38170	6758
Williamsburg	VA0074	16.72%	3619	605

\* CPR = Percent of competitive DBS penetration rate. Some CPRs are not exactly correct because of fractional DBS subscribers used in Cox's calculations but not reproduced above.

\*\* VA0407 is listed in the Commission's database as Yorktown Naval Weapons Station, but is served pursuant to Cox's Naval Bases franchise.

## ATTACHMENT B

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## COMMUNITIES SERVED BY COX COMMUNICATIONS HAMPTON ROADS, LLC

<b>Communities</b>	<b>CUIDs</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Currituck County	NC0787	6902	363	5.26%
King and Queen County	VA0497	2673	226	8.45%



## ATTACHMENT C

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## COMMUNITIES SERVED BY COX COMMUNICATIONS HAMPTON ROADS, LLC

<b><u>Communities</u></b>	<b><u>CUIDs</u></b>
Coast Guard Center Portsmouth	VA0579
Fort Eustis	VA0216
Fort Monroe	VA0243
Fort Story	VA0281
Newport News	VA0031
Poquoson	VA0269
Virginia Beach	VA0074